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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 DAVID J. COTA,

12 Plaintiff,

13 v.

14 L.E. SCRIBNER, et al.,

15 Defendants.

) Case No. 09cv2507-AJB (BLM)

) **REPORT AND RECOMMENDATION**
) **GRANTING DEFENDANTS' MOTION**
) **TO DISMISS**

) [ECF No. 51]
)

16 This Report and Recommendation is submitted to United States District Judge
17 Anthony J. Battaglia pursuant to 28 U.S.C. § 636(b) and Local Civil Rules 72.1(c) and 72.3(f) of
18 the United States District Court for the Southern District of California.

19 On November 6, 2009, Plaintiff David J. Cota, a state prisoner proceeding *pro se* and *in*
20 *forma pauperis*, filed this civil rights suit against the warden at Calipatria State Prison,
21 L.E. Scribner, and five officers, R. Bishop, J. Crabtree, E. Duarte, G. Stratton, and M. Tamayo,
22 under 42 U.S.C. § 1983. ECF No. 1. Plaintiff asserted claims under the First Amendment, Eighth
23 Amendment, and Fourteenth Amendment, as well as a separate conspiracy claim. *Id.* at 16-32.
24 Defendants filed a motion to dismiss (ECF No. 20) and Plaintiff opposed the motion (ECF No. 34).
25 On November 10, 2010, this Court issued a Report and Recommendation for an Order Granting
26 in Part and Denying in Part Defendants' Motion to Dismiss. ECF No. 35. On December 8, 2010,
27 Judge Benitez, noting a lack of any written objections to the Report and Recommendation, issued
28 an Order Adopting the Report and Recommendation in its entirety. ECF No. 36.

1 Plaintiff, however, filed Objections to the Report and Recommendation on December 10,
2 2010 (ECF No. 39), prompting Judge Benitez to allow Defendants to file a reply (ECF No. 40),
3 which they did (ECF No. 41). On February 14, 2011, Judge Benitez issued an Order Adopting
4 the Report and Recommendation in its entirety over Plaintiff's objections, thereby granting in part
5 and denying in part Defendants' motion to dismiss. ECF No. 42. Plaintiff was granted leave to
6 amend his Eighth Amendment Claim, as well as his Fourteenth Amendment equal protection
7 claim against Defendants Bishop, Crabtree, Duarte, Stratton, and Tamayo. ECF No. 35 at 27;
8 ECF No. 42 at 2-3. Plaintiff's First Amendment freedom of association claim was dismissed
9 without leave to amend, but all of Plaintiff's other claims survived. ECF Nos. 35 at 27; ECF No.
10 42 at 2-3.

11 On March 30, 2011, Plaintiff filed a First Amended Complaint ("FAC") re-alleging all of the
12 claims asserted in his original complaint, except the First Amendment freedom of association
13 claim. ECF No. 50. On April 12, 2011, Defendants filed a motion to dismiss the Eighth
14 Amendment claim and the Fourteenth Amendment equal protection claim against Defendants
15 Bishop, Crabtree, Duarte, Stratton, and Tamayo ("Defs.' Mem."). ECF No. 51. Plaintiff opposed
16 the motion ("Pl.'s Opp'n") (ECF No. 53), Defendants filed a reply ("Defs.' Reply") (ECF No. 54),
17 and this Court took the matter under submission (ECF No. 52).

18 The Court has considered Plaintiff's FAC, Defendants' Motion to Dismiss, Plaintiff's
19 Opposition, Defendants' Reply, and all supporting documents submitted by the parties. For the
20 reasons set forth below, this Court **RECOMMENDS** that Defendants' Motion to Dismiss be
21 **GRANTED**.

22 **FACTUAL BACKGROUND**

23 Plaintiff is a prisoner in the custody of the California Department of Corrections and
24 Rehabilitation ("CDCR"), currently housed within the Security Housing Unit ("SHU") at Pelican Bay
25 State Prison. FAC at 2. In 1995, Plaintiff was validated as an associate of the Mexican Mafia
26 prison gang, but in 2000, the Director's Review Board ("DRB") determined Plaintiff's gang status
27 to be "inactive." *Id.* at 2-3. In April 2002, Plaintiff was transferred to Calipatria State Prison, and
28 he alleges that two events at Calipatria led prison officials to retaliate against the prison's

1 Hispanic inmates. Id. at 3. Plaintiff describes the first event as simply an “incident” involving
2 Hispanic inmates and prison staff on August 18, 2005.¹ Id. He describes the second event as
3 an assault on a staff member on March 20, 2006. Id. Plaintiff alleges that a white inmate
4 perpetrated the March assault, but prison officials “falsely blamed [it] on Hispanic inmates.” Id.

5 On April 29, 2006, Investigative Services Unit (“ISU”) officers took Plaintiff outside the
6 housing unit for questioning by officers from the Special Security Unit (“SSU”). Id. During the
7 interview, an unnamed SSU officer allegedly told Plaintiff that Defendant Scribner, the warden
8 at Calipatria, “requested to have all ‘DRB’ inactive gang status Hispanic inmates be [sic] removed
9 from the general population because of the staff assaults.” Id. Plaintiff told the officers that he
10 had no problems with prison staff, he had received five laudatory reports from correctional
11 officers in February 2006, and he was working with a correctional counselor on his Parole
12 Hearing Report. Id. at 4.

13 Plaintiff alleges that on May 1, 2006, Defendant Bishop authored three false reports
14 against Plaintiff in compliance with, and in furtherance of, Defendant Scribner’s directive to “‘find
15 something’ (do whatever it took—including authoring false reports/charges) in order to get the
16 Hispanic DRB inactive gang status inmates off the general population yard and re-validate them.”
17 Id. at 6. The reports authored by Defendant Bishop, a correctional officer in the Gang
18 Intelligence Operations Unit, state that the following items were discovered in Plaintiff’s cell: (1)
19 two birthday cards containing a symbol used to express loyalty to the Mexican Mafia; (2) a
20 drawing by a well known member of the Mexican Mafia; and (3) a coded address book. FAC Ex.
21 H. Plaintiff asserts that: (1) he did not draw the alleged gang symbol inside the birthday card
22 given to him and he was unaware of its meaning; (2) the other birthday card and the drawing
23 by the gang member belonged to another prisoner; and (3) he coded the address book to
24 protect family and friends in case of loss, theft, or misplacement, not to hide gang activity. FAC
25 at 8-9.

26 On June 2, 2006, two officers, including Defendant Crabtree, a sergeant with the ISU,
27 approached Plaintiff in the yard for a pre-validation interview. Id. at 9-10. Plaintiff alleges that
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¹ Plaintiff, in an administrative appeal, referred to this incident as a “riot.” FAC Ex. T, at 3.

1 he had prepared a written statement regarding the material being used against him and had the
2 statement in his cell, but Defendant Crabtree did not offer to get the statement from Plaintiff's
3 cell and Plaintiff could not return to his cell unless a prison guard escorted him. Id. at 10. When
4 Plaintiff asked Defendant Crabtree about the alleged gang symbol in the card, the officer
5 allegedly told him that it was "a 'wobbler' as a prison gang symbol, but that it was being used
6 against Plaintiff in that fashion anyway." Id. Plaintiff alleges that Defendant Crabtree then
7 walked away, refusing to take his statement. Id.

8 At some point in July 2006, Plaintiff received a report authored by Defendant Duarte, a
9 gang investigator with the ISU. Id. at 10-11; FAC Ex. I. The report summarized the prison's
10 investigation into Plaintiff's gang status and indicated that the prison would be requesting that
11 the Office of Correctional Safety revalidate Plaintiff as a gang associate of the Mexican Mafia.
12 FAC Ex. I. Defendant Duarte claimed that Plaintiff possessed a mail drop address utilized by an
13 active gang member, and Defendant Duarte also claimed that he contacted Plaintiff for a pre-
14 validation interview, but Plaintiff refused to be interviewed. Id. Plaintiff alleges that Defendant
15 Duarte's report was false, omitted key facts, and contained manipulated statements. FAC at 11.
16 On July 27, 2006, the Office of Correctional Safety revalidated Plaintiff as an associate of the
17 Mexican Mafia prison gang. Id. at 10.

18 On July 31, 2006, Plaintiff filed an administrative grievance that accused Defendant Duarte
19 of writing his report with "malice intent and wreakless [sic] disregard for the truth." FAC Ex. P,
20 at 1. Plaintiff stated that his address book contained no prison gang addresses and that
21 Defendant Duarte never came to speak with him—Defendant Crabtree did. Id. at 3. Plaintiff
22 alleges that when he asked Defendant Stratton, the initial reviewer² of his grievance, why he was
23 removed from the yard, Defendant Stratton "stated that the warden wanted all DRB inactive
24 gang status Hispanic inmates off the yard." FAC at 12. Plaintiff alleges that he told Defendant
25 Stratton "that he was doing a positive program, that his prison file reflects no current gang
26 activity and that [he] had been disciplinary free close to ten (10) years." Id. Plaintiff alleges that
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28 ² Plaintiff's grievance bypassed the Informal, Formal, and First Levels of Review. FAC Ex. P, at 1-2.
Defendant Stratton interviewed Plaintiff regarding his appeal at the Second Level of Review. Id. at 2, 4.

1 Defendant Stratton stated that "all of Plaintiff's positive work and behavior did not matter," and
 2 Defendant Stratton denied Plaintiff's appeal on December 26, 2006. Id. at 12-13; FAC Ex. P, at
 3 1-2, 4. Plaintiff pursued his grievance through the prison system's final level of review, the
 4 Director's Level, where it was denied on April 16, 2007. FAC Ex. P, at 2, 7-8.

5 In March 2007, Plaintiff became aware of another staff report concerning his 2006 gang
 6 investigation. FAC at 13. Plaintiff alleges that this report, authored by Defendant Tamayo,
 7 "contained the same false, manipulated and omitted information as [Defendant] Duarte's
 8 report" Id. Plaintiff alleges that Defendant Tamayo knowingly made these false and
 9 manipulated statements in his report, which stressed that Plaintiff "has demonstrated he is an
 10 active associate of the [Mexican Mafia] prison gang and [Plaintiff's] status should be updated to
 11 that of validated Associate of the [Mexican Mafia] prison gang." Id.; FAC Ex. J.

12 Plaintiff alleges that the prison officials' unlawful actions caused him to be removed from
 13 general population, put into administrative segregation, re-validated as a Mexican Mafia prison
 14 gang associate, and placed into solitary confinement for an indefinite term. FAC at 5-7, 14.
 15 Plaintiff alleges that the result is a grave loss of privileges and loss of a parole date, thereby
 16 constituting "a harsh punishment" in "a very harsh environment." Id. at 7.

17 **DISCUSSION**

18 To state a viable claim under § 1983, a plaintiff must allege that (1) a person acting under
 19 the color of state law committed the conduct at issue, and (2) the conduct violated a right
 20 provided by the Constitution or laws of the United States. See, e.g., West v. Atkins, 487 U.S. 42,
 21 48 (1988). A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal
 22 sufficiency of a complaint. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). To survive
 23 such a motion, a plaintiff must set forth "enough facts to state a claim to relief that is plausible
 24 on its face." Id. at 570. Naked assertions "devoid of further factual enhancement" are
 25 insufficient. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citation and internal quotation
 26 marks omitted); see also Moss v. United States Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009).
 27 In evaluating a claim, the court should use judicial experience and common sense as its guide.
 28 Iqbal, 129 S. Ct. at 1950.

At this stage of the litigation, a court must accept as true all factual allegations in the complaint, Erickson v. Pardus, 551 U.S. 89, 93-94 (2007), but it “need not accept as true conclusory allegations, nor make unwarranted deductions or unreasonable inferences,” In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1057 (9th Cir. 2008) (citation omitted). In cases where the plaintiff is proceeding without counsel, and particularly in civil rights cases, a court should construe the pleadings liberally. Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010); see also Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992). The court may consider attachments to the complaint as part of the complaint. See United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003).

A. First Amendment – Freedom of Association

Pursuant to Judge Benitez’s adoption of this Court’s previous Report and Recommendation in its entirety, Plaintiff’s First Amendment free association claim was dismissed without leave to amend. ECF No. 35 at 15-16, 27; ECF No. 42 at 2. However, in their instant motion to dismiss, Defendants “move for dismissal of this claim out of an abundance of caution,” asserting that Plaintiff’s FAC fails to plead a claim for freedom of association and requesting that the Court “maintain its ruling dismissing Plaintiff’s claim . . . with prejudice.” Defs.’ Mem. at 8. Defendants correctly point out that Plaintiff’s FAC contains a heading for a fourth cause of action entitled, “First Amendmend [sic] - Right to Association,” but that there is no text under the heading. Id.; FAC at 27. Plaintiff acknowledges that his freedom of association claim was dismissed without leave to amend, and he explains that he “just put in the ‘caption’ of that claim” in order to preserve that claim for appeal, “if need be out of ‘an abundance’ of caution.” Pl.’s Opp’n at 2. Plaintiff, however, “denies the defendant[s]’ allegation that [this claim] should be dismissed ‘with prejudice.’” Id. Plaintiff seemingly fails to understand that by not granting Plaintiff leave to amend his freedom of association claim, Judge Benitez’s Order dismissed Plaintiff’s freedom of association claim with prejudice. ECF No. 42 at 2. Accordingly, the Court **RECOMMENDS** that Defendants’ Motion to Dismiss Plaintiff’s freedom of association claim—to the extent that there is such a claim in Plaintiff’s FAC—be **GRANTED**.

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1 B. Eighth Amendment

2 The Court granted Plaintiff leave to amend his Eighth Amendment claim "to add specific
3 facts establishing cruel and unusual treatment and the requisite mental state for each
4 defendant." ECF No. 35 at 18; see ECF No. 42 at 3. Plaintiff asserts that Defendants violated
5 his Eighth Amendment right to be free from cruel and unusual punishment by falsifying reports
6 against him and wrongfully removing him from the general population. FAC at 17-21. Plaintiff
7 alleges that Defendants Scribner and Bishop knew Plaintiff was "a model inmate," yet they
8 proceeded to file their false reports and unlawfully retaliate against Plaintiff. Id. at 18-19.
9 Plaintiff argues that "[i]t is cruel and unusual treatment and punishment to falsely accuse[]
10 Plaintiff for actions he did not commit, or crimes he was not involved in or material he did not
11 own," and he requests that the Court establish procedural safeguards "so that prison officials can
12 no longer trample upon an innocent inmate's rights" Id. at 19, 21. Defendants argue that
13 Plaintiff's FAC does not cure the deficiencies contained in his initial complaint because Plaintiff
14 fails to allege "a deprivation of the human necessities that must form the basis of an Eighth
15 Amendment claim." Defs.' Mem. at 5.

16 As the Court explained in its previous Report and Recommendation (ECF No. 35), the
17 Supreme Court has held that the unnecessary and wanton infliction of pain upon prisoners
18 violates the Eighth Amendment. Hope v. Pelzer, 536 U.S. 730, 737 (2002). To challenge his
19 conditions of confinement, a prisoner must satisfy a two-part test. Hearns v. Terhune, 413 F.3d
20 1036, 1042 (9th Cir. 2005). First, the plaintiff "must make an objective showing that the
21 deprivation was 'sufficiently serious' to form the basis for an Eighth Amendment violation." Id.
22 (citing Wilson v. Seiter, 501 U.S. 294, 298 (1991)). Second, the plaintiff "must make a subjective
23 showing that the prison official acted 'with a sufficiently culpable state of mind.'" Id. The Ninth
24 Circuit has held that "[p]rison officials have a duty to ensure that prisoners are provided
25 adequate shelter, food, clothing, sanitation, medical care, and personal safety." Johnson v.
26 Lewis, 217 F.3d 726, 731 (9th Cir. 2000) (citations omitted). However, the basis of an Eighth
27 Amendment violation is formed only when "those deprivations denying 'the minimal civilized
28 measure of life's necessities' are sufficiently grave" Id. (citations omitted); see also Hearns,

1 413 F.3d at 1042-43 (holding that a prisoner stated a viable Eighth Amendment claim by alleging
 2 that an institution failed to provide adequate drinking water in 100-plus degree heat); Akao v.
 3 Shimoda, 832 F.2d 119, 120 (9th Cir. 1987) (holding that “an allegation of overcrowding without
 4 more does not state a claim” under the Eighth Amendment, but the scale tips the other way
 5 when overcrowding “engenders violence, tension, and psychiatric problems”). Thus, simple
 6 placement in segregated housing, even for an indeterminate period, does not by itself constitute
 7 an Eighth Amendment violation. Toussaint v. Yockey, 722 F.2d 1490, 1494 n.6 (9th Cir. 1984).
 8 However, “conditions of confinement may establish an Eighth Amendment violation ‘in
 9 combination,’ even when each would not do so alone, ‘when they have a mutually enforcing
 10 effect that produces the deprivation of a single, identifiable human need.’” Madrid v. Gomez,
 11 889 F. Supp. 1146, 1265 n.209 (N.D. Cal. 1995) (quoting Wilson, 501 U.S. at 304).

12 Plaintiff asserts that his FAC satisfies the “objective showing” relevant to an Eighth
 13 Amendment claim because the “deprivation” he suffered is the loss of a parole date, which he
 14 claims is “sufficiently serious to state a claim.” Pl.’s Opp’n at 6. Plaintiff argues that Defendants’
 15 “collusion of false/manipulated reports” caused him to be placed in the SHU at Pelican Bay, and
 16 “[t]he Parole Board does not give parole dates to life inmates that are in the ‘SHU.’” Id. Plaintiff
 17 cites several cases in support of his contention that his placement in the SHU and concomitant
 18 loss of a parole date violates the Eighth Amendment’s prohibition on cruel and unusual
 19 punishment, but each case Plaintiff cites relates to a due process claim and not an Eighth
 20 Amendment claim.³ Plaintiff therefore offers no binding or persuasive authority to support his
 21 argument that mere placement in the SHU and loss of a parole date constitutes cruel and
 22 unusual punishment in violation of the Eighth Amendment, and the Court is unaware of any such
 23 precedent. In fact, the Supreme Court recently reiterated that “[t]here is no right under the

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 25 ³ Plaintiff cites Wilkinson v. Austin, 545 U.S. 209 (2005); Guizar v. Woodford, 282 Fed. Appx. 551 (9th Cir.
 26 2008); and Snyder v. Archie, an unpublished case filed in February 1998 in the Northern District of California, which
 27 is mentioned in Koch v. Lewis, 96 F. Supp. 2d 949, 963 n.19 (D. Ariz. 2000). However, the reasoning and holdings
 28 in those cases have neither the intent nor the effect that Plaintiff attributes to them. Plaintiff’s reliance on Wilkinson
 is misplaced because he conflates a Fourteenth Amendment Due Process Clause “significant and atypical hardship”
 analysis with an Eighth Amendment “cruel and unusual punishment” analysis. Furthermore, Plaintiff purports to quote
Guizar, but the quotation upon which he relies actually comes from Gray v. Woodford, No. 05CV1475, 2007 WL
 2790588, at *10 (S.D. Cal. Sept. 25, 2007). Regardless, both Guizar and Gray, like Wilkinson, concern a due process
 analysis. Similarly, to the extent that Snyder is discussed in Koch, it is apparent that Snyder also centers on a liberty
 interest and due process analysis.

1 Federal Constitution to be conditionally released before the expiration of a valid sentence, and
 2 the States are under no duty to offer parole to their prisoners.” Swarthout v. Cooke, 131 S. Ct.
 3 859, 862 (2011) (per curiam) (citing Greenholtz v. Inmates of Neb. Penal and Corr. Complex, 442
 4 U.S. 1, 7 (1979)). Moreover, the Ninth Circuit has determined that “[e]ven an indeterminate
 5 sentence to punitive isolation does not without more constitute cruel and unusual punishment.”
 6 Toussaint, 722 F.2d at 1494 n.6.

7 Plaintiff argues that another serious deprivation that satisfies the requisite objective
 8 showing “is in the form of daily life within the prison context.” Pl.’s Opp’n at 7. Plaintiff states
 9 that while in the general population, he held a job through which he earned an income and he
 10 attended substance addiction meetings pursuant to the Parole Board’s requirements. Id.
 11 Plaintiff further explains that in general population he enjoyed greater freedom, more privileges,
 12 and more contact visits, whereas in the SHU, he is “locked in his cell 22 ½ hours per day.” Id.
 13 Although Plaintiff’s placement in the SHU may, in fact, deprive him of certain opportunities he
 14 could otherwise pursue if he was in the general population, Plaintiff fails to articulate a “denial
 15 of the minimal civilized measure of life’s necessities” in the SHU. Foster v. Runnels, 554 F.3d
 16 807, 812 (9th Cir. 2009) (quoting Farmer v. Brennan, 511 U.S. 825, 834 (1994)) (internal
 17 quotation marks omitted). Instead, Plaintiff describes a loss of certain “educational/vocational
 18 opportunities . . . which would go towards his rehabilitative efforts and parole and life pursuits.”
 19 Pl.’s Opp’n at 7. Because Plaintiff does not contend that while in the SHU he has been deprived
 20 of adequate food, clothing, shelter, sanitation, medical care, or personal safety, he fails to satisfy
 21 the “objective showing” pertinent to an Eighth Amendment claim. See Farmer, 511 U.S. at 832;
 22 Johnson, 217 F.3d at 731-32; see also Gonzales v. Cal. Dep’t of Corr., --- F. Supp. 2d ---, 2011
 23 WL 1045228, at *8 (N.D. Cal. Mar. 22, 2011) (“[T]he overall conditions of the SHU [at Pelican
 24 Bay] do not violate the Eighth Amendment for the non-mentally ill inmates therein.”) (citing
 25 Madrid, 889 F. Supp. at 1227-30, 1260-65). To the extent that prison conditions “are restrictive
 26 and even harsh, they are a part of the penalty that criminal offenders pay for their offenses
 27 against society.” Rhodes v. Chapman, 452 U.S. 337, 347 (1981); see also Keenan v. Hall,
 28 83 F.3d 1083, 1092 (9th Cir. 1996) (“[T]here is no constitutional right to ‘access to a particular

1 visitor.'") (quoting Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 461 (1989)).

2 Plaintiff further contends that his FAC satisfies the "subjective showing" relevant to
3 an Eighth Amendment claim because Defendants Scribner and Bishop acted with a sufficiently
4 culpable state of mind. Pl.'s Opp'n at 8-9. Plaintiff claims that "Defendant Scribner did wilfully,
5 maliciously and with cruel purpose, mastermind the illegal removal of Plaintiff from general
6 population under false pretences [sic] and false charges of illegal conduct." FAC at 17. Plaintiff
7 further alleges that Defendant Scribner ordered Defendant Bishop "to carry out these illegal and
8 cruel treatments and actions against Plaintiff" and Defendant Bishop did so "maliciously, wilfully
9 and for the purpose of causing cruel punishment to Plaintiff." Id. Plaintiff asserts that Defendant
10 Scribner and Defendant Bishop "knew it was wrong to target an innocent person (Plaintiff)," but
11 they did so anyway, which "proves their culpable mental state." Pl.'s Opp'n at 8.

12 Although Plaintiff repeatedly uses the words, "cruel," "unusual," and "punishment" in
13 articulating his Eighth Amendment claim, and Plaintiff asserts that Defendants Scribner and
14 Bishop acted "maliciously" and "wilfully," Plaintiff fails to support his claims with non-conclusory
15 factual statements showing that he has or will be deprived of "the minimal civilized measure of
16 life's necessities" in SHU, let alone that Defendants were aware of a substantial risk that he
17 would be so deprived. Farmer, 511 U.S. at 834 (quoting Rhodes, 452 U.S. at 347); see also
18 Throop v. Sec'y of Corr., Slip Copy, 2010 WL 3418353, at *6-8 (S.D. Cal. Aug. 27, 2010)
19 (dismissing inmate's claim that correctional officers violated the Eighth Amendment by "placing
20 [him] in SHU despite their knowledge that [the inmate] is not an active member or associate of
21 [the Mexican Mafia]" because the inmate's complaint "contains no facts which indicate that [the
22 inmate] was deprived of life's necessities or that he was otherwise subjected to a substantial risk
23 of harm") (internal quotation marks omitted). Despite Plaintiff's insistence that Defendants
24 Scribner and Bishop wrongfully placed him in the SHU, Plaintiff fails to set forth specific facts to
25 support a plausible claim that he faced or faces a sufficiently serious risk of harm in the SHU or
26 that Defendants Scribner or Bishop were aware that their actions subjected Plaintiff to a serious
27 risk of harm. See Twombly, 550 U.S. at 570; Wilson, 501 U.S. at 303. Plaintiff has therefore
28 failed to establish the objective as well as the subjective components of an Eighth Amendment

1 prison conditions claim. See Hearns, 413 F.3d at 1042.

2 Plaintiff, however, contends that his Eighth Amendment claim need not be limited to the
3 "conditions of confinement" and insists that he "can assert a cruel and unusual punishment claim
4 against [Defendants]" because the Defendants' actions of "falsifying/ manipulating reports
5 against [him], was in fact and for the purpose of retaliatory punishment." Pl.'s Opp'n at 5.
6 Plaintiff asserts that:

7 [R]etaliatory accusation[s] by guards against prisoners, can and do arise for a
8 variety of reasons. Sometimes they fall within the purview of the First Amend-
9 ment. Sometimes the "evidentiary" value of the accusations falls within the Due
Process Clause. But there is no protection for a prisoner against false retaliatory
accusations by guards when they come for/under some other reason.

10 Id. at 10. Accordingly, Plaintiff argues that he "can plead an Eighth Amendment claim based
11 [on] false retaliatory reports as a form of cruel and unusual punishment." Id. at 12. Plaintiff
12 cites Johnson v. Lewis, 217 F.3d 726, 731 (9th Cir. 2000) for his argument that "the cruel and
13 unusual umbrella does not limit an inmate[']s claim to the 'conditions of confinement' such as
14 'basic necessities,' etc; as the [D]efendant[s] allege." Pl.'s Opp'n at 5. Plaintiff contends that
15 the reasoning and holding in Johnson "opened up the [Eighth] Amendment[']s application as the
16 need arises in law," and, as a result, "the Supreme Court is in fact setting forth that Plaintiff has
17 a legal basis for an Eighth Amendment claim." Id. Although passionate, Plaintiff's argument is
18 unavailing. As an initial matter, Johnson is a Ninth Circuit Court of Appeal opinion, not a
19 Supreme Court opinion. Moreover, in Johnson, the Ninth Circuit held that "[t]he Eighth
20 Amendment does not tolerate prison officials' deliberate indifference, in the absence of exigent
21 circumstances, to substantial deprivations of adequate shelter, food, drinking water, and
22 sanitation." 217 F.3d at 735. Thus, contrary to Plaintiff's assertions otherwise, Johnson dealt
23 squarely with inmates' claims regarding "severe deprivations of basic human necessities"
24 Id. Consequently, Plaintiff offers no binding or persuasive authority to support his argument
25 that false or manipulated reports constitute cruel and unusual punishment in violation of the
26 Eighth Amendment, and the Court is unaware of any such precedent.⁴

28 ⁴ Plaintiff also cites Hines v. Gomez, 108 F.3d 265 (9th Cir. 1997) as support for his proposition that he can
plead an Eighth Amendment claim based on false retaliatory reports as a form of cruel and unusual punishment. FAC
at 19-21; Pl.'s Opp'n at 9-12. However, Hines, which is premised upon a First Amendment retaliation claim, provides

In this Court's previous Report and Recommendation, Plaintiff was given the legal standards for stating an Eighth Amendment claim and Plaintiff was also specifically informed of the deficiencies in his claim against Defendants. ECF No. 35 at 16-18. Plaintiff's FAC has done nothing to meaningfully address the deficiencies previously identified by the Court. As such, the Court finds that Plaintiff's Eighth Amendment claim is not capable of being remedied by granting any further leave to amend. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 701 (9th Cir. 1990) ("Leave to amend should be granted if it appears at all possible that the plaintiff can correct the defect.") (citation and internal quotation marks omitted). The Court therefore **RECOMMENDS** that Defendants' Motion to Dismiss Plaintiff's Eighth Amendment claim be **GRANTED** without leave to amend.

C. Fourteenth Amendment – Equal Protection

The Court granted Plaintiff leave to amend his Fourteenth Amendment equal protection claim against Defendants Bishop, Crabtree, Duarte, Stratton, and Tamayo because Plaintiff failed to link these Defendants to Plaintiff's allegedly unconstitutional removal from the general population. ECF No. 35 at 22-24, 27; see ECF No. 42 at 3.⁵ Defendants argue that Plaintiff fails to allege in his FAC any act of discrimination against these Defendants that supports a claim under the Equal Protection Clause. Defs.' Mem. at 6. In response, Plaintiff states that he "has not alleged a claim of Equal Protection against [D]efendants Crabtree, Duarte, Stratton, Bishop or Tamayo in the FAC because Judge Benitez adopted the Magistrate's Report and Recommendation on this claim over Plaintiff's objections; Plaintiff limited this equal protection claim to Defendant Scribner." Pl.'s Opp'n at 2-3.

Although Plaintiff is correct in his belief that Judge Benitez adopted this Court's Report and Recommendation over Plaintiff's objections, Judge Benitez's Order states: "Plaintiff's Equal Protection claim is dismissed with leave to amend as to Defendant Bishop" and "Plaintiff's Equal Protection claim is also dismissed with leave to amend [as] to the other Defendants, except

no authority for Plaintiff's argument.

⁵ In contrast, the Court found that Plaintiff properly alleged, with the requisite specificity, that Defendant Scribner discriminated against Plaintiff on prohibited grounds. ECF No. 35 at 22-24, 27; see ECF No. 42 at 3. The Court therefore denied Defendants' Motion to Dismiss Plaintiff's Fourteenth Amendment equal protection claim against Defendant Scribner. ECF No. 35 at 27; ECF No. 42 at 3.

Defendant Scribner.” ECF No. 42 at 3. That is, Plaintiff was given leave to revise his equal protection claim as to all Defendants *except* Defendant Scribner; Plaintiff’s equal protection claim against Defendant Scribner did not require revision because Defendants’ Motion to Dismiss Plaintiff’s equal protection claim against Defendant Scribner was denied. ECF No. 35 at 27; ECF No. 42 at 3. However, Plaintiff seemingly misread or misinterpreted Judge Benitez’s Order such that he amended his equal protection claim as to Defendant Scribner and abandoned his equal protection claim as to all other Defendants. Seizing upon Plaintiff’s misconstrual, Defendants, in their reply, state “Plaintiff [] concedes that he does not allege a claim for violation of the Equal Protection Clause against Defendants Crabtree, Duarte, Stratton, Bishop, or Tamayo.” Defs.’ Reply at 1.

As the Court explained in its previous Report and Recommendation (ECF No. 35), the Equal Protection Clause of the Fourteenth Amendment protects prisoners from, among other things, “invidious discrimination based on race.” Wolff v. McDonnell, 418 U.S. 539, 556 (1974). The clause “commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.” City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). The Ninth Circuit has held that “§ 1983 claims based on Equal Protection violations must plead intentional unlawful discrimination or allege facts that are at least susceptible of an inference of discriminatory intent.” Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1026 (9th Cir. 1998) (citations omitted); see also Serrano v. Francis, 345 F.3d 1071, 1081-83 (9th Cir. 2003) (holding that a prison officer’s racially tinged remarks to an inmate during a disciplinary hearing created a genuine issue of material fact about the officer’s potentially discriminatory motives). Discriminatory intent implies that the decision-maker “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” Pers. Adm’r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (footnote omitted).

Upon reviewing Plaintiff’s FAC, the Court finds that Plaintiff does indeed fail to state a claim for relief under the Equal Protection Clause against Defendants Bishop, Crabtree, Duarte,

Stratton, and Tamayo because Plaintiff focuses his equal protection claim solely against Defendant Scribner. See FAC at 21-27. Although Plaintiff alleges that Defendant Scribner “intentionally discriminated against Plaintiff because of his race,” Plaintiff only mentions the other Defendants by name in his due process argument. See id. at 22-27. As a result, the Court is compelled to **RECOMMEND** that Defendants’ Motion to Dismiss Plaintiff’s equal protection claim against Defendants Bishop, Crabtree, Duarte, Stratton, and Tamayo be **GRANTED**. However, because the Court finds that Plaintiff failed to amend his equal protection claim against these Defendants as a result of misreading or misinterpreting Judge Benitez’s Order, the Court **RECOMMENDS** that Defendants’ Motion to Dismiss Plaintiff’s equal protection claim against Defendants Bishop, Crabtree, Duarte, Stratton, and Tamayo be **GRANTED** with leave to amend.⁶ See Ramirez v. Galaza, 334 F.3d 850, 861 (9th Cir. 2003) (“Leave to amend should be granted unless the pleading could not possibly be cured by the allegation of other facts, and should be granted more liberally to pro se plaintiffs.”) (citation and internal quotation marks omitted).

SUMMARY OF RECOMMENDATIONS

To summarize the foregoing, the Court recommends that:

- Defendants’ Motion to Dismiss Plaintiff’s First Amendment freedom of association claim be **GRANTED WITHOUT LEAVE TO AMEND**;
- Defendants’ Motion to Dismiss Plaintiff’s Eighth Amendment claim be **GRANTED WITHOUT LEAVE TO AMEND**; and
- Defendants’ Motion to Dismiss Plaintiff’s Fourteenth Amendment equal protection claim against Defendants Bishop, Crabtree, Duarte, Stratton, and Tamayo be **GRANTED WITH LEAVE TO AMEND**.

CONCLUSION

For all the foregoing reasons, **IT IS HEREBY RECOMMENDED** that the District Court issue an Order: (1) approving and adopting this Report and Recommendation, and (2) **GRANTING** Defendants’ Motion to Dismiss.

⁶ Plaintiff’s equal protection claim against Defendant Scribner survived Defendants’ initial motion to dismiss. ECF No. 35 at 22-24, 27; ECF No. 42 at 3. Because Defendants did not seek to dismiss Plaintiff’s equal protection claim against Defendant Scribner in their instant motion to dismiss, the Court does not address the merits of that claim.

1 **IT IS HEREBY ORDERED** that any written objections to this Report must be filed with
2 the Court and served on all parties **no later than July 18, 2011**. The document should be
3 captioned "Objections to Report and Recommendation."

4 **IT IS FURTHER ORDERED** that any reply to the Objections shall be filed with the Court
5 and served on all parties **no later than August 1, 2011**. The parties are advised that failure
6 to file objections within the specified time may waive the right to raise those objections on
7 appeal of the Court's order. See Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998).

8 **IT IS SO ORDERED.**

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10 DATED: June 27, 2011

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12 BARBARA L. MAJOR
13 United States Magistrate Judge
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